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**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**



**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

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| THE PEOPLE,<br>Plaintiff and Respondent,<br>v.<br>NAZMUL SAM HUDA,<br>Defendant and Appellant. | E064981<br>(Super.Ct.No. RIF1202272)<br>OPINION |

APPEAL from the Superior Court of Riverside County. Steven G. Counelis, Judge. Affirmed.

Zulu Ali for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Seth Friedman and Meagan J. Beale, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Nazmul Sam Huda pled guilty in 2010 to maintaining a place where drugs were used or sold (Health & Saf. Code, § 11366). Pursuant to the plea

agreement, the remaining charge was dismissed and defendant was placed on probation on various terms and conditions, including serving 120 days of custody to be served in a work-release program.

In 2015, defendant, a citizen of Pakistan, filed an unsuccessful motion to vacate his conviction pursuant to Penal Code section 1016.5,[1] arguing his conviction should be vacated because he was not adequately advised of his immigration consequences. Defendant appeals from the denial of that motion, claiming the trial court erred pursuant to *Padilla v. Kentucky* (2010) 559 U.S. 356 (*Padilla*) and in light of the "legislative intent" of section 1016.5. We find no error and affirm the order.

I

FACTUAL AND PROCEDURAL BACKGROUND[2]

On July 18, 2009, defendant sold two MDMA tablets to undercover officers from the San Bernardino Police Department at a "Rave." In addition, during a search of defendant's person, officers located an additional 36 MDMA tablets and two individual amounts of marijuana in defendant's right front pocket.

On August 6, 2009, the San Bernardino County District Attorney's Office filed a felony complaint charging defendant with the sale of a controlled substance (Health & Saf. Code, § 11379, subd. (a)).

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[1] All future statutory references are to the Penal Code unless otherwise stated.

[2] The factual background is taken from the probation officer's report.

On March 25, 2010, defendant entered into a negotiated plea. The People agreed to amend the complaint by interlineation to add count 2, maintaining a place where drugs were used or sold in violation of Health and Safety Code section 11366, and defendant agreed to plead guilty to that charge. The parties also agreed that defendant would be placed on probation for a period of three years on various terms and conditions, including serving 120 days of custody to be served in a work-release program.

Prior to pleading guilty before the San Bernardino County Superior Court, defendant signed a change of plea form under penalty of perjury, initialing paragraph 14 that said that he understood that if he was not a citizen of the United States, "deportation, exclusion from admission to the United States, or denial of naturalization *will* result" from his conviction. Additionally, during the taking of the plea, the trial court asked defendant if he understood that if he was not a citizen of the United States "the consequences of [the] conviction *will* include deportation, exclusion from admission to the United States or denial of naturalization pursuant to the laws of the United States." Defendant stated that he understood those consequences. The trial court also asked defendant's counsel if he had adequate time to discuss "all these issues" with defendant and whether he went over the declaration and plea form with defendant. Defendant's counsel replied in the affirmative. Defendant's counsel also responded in the affirmative to the trial court's inquiry as to whether counsel was satisfied defendant understood everything on the plea form. Defendant thereafter pled guilty to the added count 2 of maintaining a place where drugs are used or sold in violation of Health and Safety Code

section 11366. The trial court found a factual basis for the plea, and the People dismissed the remaining charge. The trial court also found defendant entered into the plea freely, voluntarily, knowingly, and intelligently.

On May 26, 2010, defendant moved before the San Bernardino County Superior Court to vacate his plea due to alleged failures of his trial counsel to advise him of the immigration consequences of his plea. That motion was denied.[3] Defendant was sentenced in accordance with the agreed upon terms.

Defendant appealed from the denial of his 2010 motion to vacate, and requested a certificate of probable cause. His request for a certificate of probable cause was denied. On April 29, 2011, this court, in case No. E051427, dismissed defendant's appeal, because the appeal was solely based on a challenge to the validity of the plea and defendant's request for a certificate of probable cause was denied.[4]

On August 6, 2010, defendant pleaded guilty before the San Bernardino County Superior Court to driving under the influence of alcohol (Veh. Code. § 23152, subd. (a)). He also admitted to violating his probation in this current drug case. Defendant's probation was thereafter revoked and reinstated, and modified to require defendant to serve 150 days in custody on the weekender program.

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[3] The 2010 motion to vacate is not included in the record on appeal. Defendant provided information about the 2010 motion in his 2015 motion to vacate and affirmed it at the 2015 motion hearing.

[4] Defendant also filed a petition for writ of mandate, case No. E051530. This court summarily denied his petition on August 24, 2010.

Five years later, on July 17, 2015, defendant, represented by retained counsel, filed a second motion to vacate his conviction pursuant to section 1016.5 with supporting declarations and exhibits. This motion was filed with the Riverside County Superior Court.[5]

On August 18, 2015, the Riverside County District Attorney's office filed an opposition, arguing that defendant failed to exercise due diligence and that defendant received the requisite immigration admonishment.

A hearing on defendant's second motion to vacate his conviction was held on November 18, 2015. Following argument by the parties, the trial court denied the motion, finding: (1) it was an improper second motion as nothing had changed since 2010; (2) defendant did not exercise reasonable diligence in bringing the motion; and (3) when defendant entered his plea in 2010, he acknowledged that he had been advised that the conviction would result in deportation, exclusion from the United States, or denial of naturalization. This appeal followed.

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[5] Although the probation officer reported that defendant resided in Riverside County and the court "needs to make a determination pursuant to PC 1203.9," it is unknown whether the matter was transferred to Riverside County from San Bernardino County.

Section 1203.9, subdivision (a)(1), provides: "Except as provided in paragraph (3), whenever a person is released on probation or mandatory supervision, the court, upon noticed motion, shall transfer the case to the superior court in any other county in which the person resides permanently, meaning with the stated intention to remain for the duration of probation or mandatory supervision, unless the transferring court determines that the transfer would be inappropriate and states its reasons on the record."

II

DISCUSSION

Defendant contends that the trial court erred when it denied his motion to vacate his conviction under section 1016.5 because he was not adequately advised of the immigration consequences of the plea. Assuming, without deciding, the second motion was properly brought before the Riverside Superior Court and with reasonable diligence, we reject defendant's contention.

"Before accepting a plea of guilty or no contest, a trial court is statutorily required to advise a defendant that if the defendant is not a citizen of this country, the plea could result in deportation, exclusion from the United States, or denial of naturalization. (Pen. Code, § 1016.5, subd. (a).)" (*People v. Arriaga* (2014) 58 Cal.4th 950, 955.) Specifically, section 1016.5 requires a trial court to administer the following advisement on the record before it accepts a defendant's plea of guilty or no contest: "If you are not a citizen, you are hereby advised that conviction of the offense for which you have been charged may have the consequences of deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States." (§ 1016.5, subd. (a).)

Section 1016.5 further provides that if "the court fails to advise the defendant as required" and the defendant shows that the conviction may have adverse immigration consequences, the court must grant a motion to vacate the judgment and allow the defendant to withdraw the plea. (§ 1016.5, subd. (b).) To obtain that relief, a defendant

must demonstrate that (1) the court failed to advise the defendant of the immigration consequences as provided by section 1016.5, (2) as a consequence of conviction, the defendant actually faces one or more of the statutorily specified immigration consequences, and (3) the defendant was prejudiced by the court's failure to provide complete advisements. (*People v. Totari* (2002) 28 Cal.4th 876, 884; *People v. Superior Court* (*Zamudio*) (2000) 23 Cal.4th 183, 192 (*Zamudio*).) The purpose of section 1016.5 is to ensure that a defendant has both actual knowledge of the possible adverse immigration consequences of a guilty plea and a chance to make an intelligent choice whether to plead guilty. (*Zamudio, supra,* at pp. 193-194.) We review a motion under section 1016.5 for an abuse of discretion. (*Zamudio, supra,* at pp. 192, 199-200.)

When entering his guilty plea, defendant was advised of the immigration consequences of his plea nearly word-for-word as required by section 1016.5. In fact, the advisement defendant received was even stronger than required by the statute because defendant was told his guilty plea *will* result in his deportation, exclusion from admission, and denial of naturalization, not just that his plea *may* have those consequences.

Defendant claims, however, that the "legislative intent" behind section 1016.5 and the United States Supreme Court's decision in *Padilla, supra,* 559 U.S. 356, required the trial court to advise him of immigration consequences beyond those about which he was warned. He also contends that the warning required by section 1016.5 is no longer adequate because discretionary relief from deportation has not been possible since 1996.

He asserts he should have been told that his plea would result in mandatory deportation and he argues the trial court should have informed him that relief such as cancellation of removal or asylum would be unavailable to him. These contentions are meritless, and defendant cannot show prejudice in any event.

Section 1016.5 includes a statement of legislative intent declaring that the purpose of the statutory advisement is "to promote fairness to . . . accused individuals by requiring . . . that acceptance of a guilty plea or plea of nolo contendere be preceded by an appropriate warning of the special consequences for . . . a [non-citizen] defendant." (§ 1016.5, subd. (d).) "The broad statement of intent in section 1016.5, subdivision (d), and its concern with fairness to the accused, does not override the section's narrow requirements and precise remedy." (*People v. Chien* (2008) 159 Cal.App.4th 1283, 1288 (*Chien*).) Nothing in section 1016.5 requires more than an advisement of the three major consequences of a plea that subdivision (a) of the statute references. (*People v. Gutierrez* (2003) 106 Cal.App.4th 169, 174; *People v. Gontiz* (1997) 58 Cal.App.4th 1309, 1316 [court must advise defendant of three consequences of plea set forth in section 1016.5], disapproved on another ground in *Zamudio*, *supra*, 23 Cal.4th at p. 200, fn. 8 [our Supreme Court disapproved *Gontiz* on the showing of prejudice required in motions under section 1016.5].) Defendant received precisely that advisement here.

As for *Padilla*, the Supreme Court's holding has no bearing on this case. *Padilla* holds that a defense attorney provides constitutionally deficient assistance when he or she does not advise a non-citizen client about the risk of deportation attendant to a guilty

plea. (*Padilla, supra*, 559 U.S. at pp. 373-374.) Defendant does not argue his attorney was ineffective; indeed, he may not bring a section 1016.5 motion to raise such a claim. (*Chien, supra*, 159 Cal.App.4th at p. 1285.) In fact, this court has held that *Padilla* is not relevant to a defendant's motion under section 1016.5, which addresses the trial court's obligation to advise of possible consequences. (*People v. Mbaabu* (2013) 213 Cal.App.4th 1139, 1145.) Additionally, defendant cannot seek such relief because he is no longer in custody. (See *People v. Shokur* (2012) 205 Cal.App.4th 1398, 1406-1407 [no ineffective assistance of counsel claim when defendant is no longer in custody].)

In the present matter, the trial court and the plea form here informed defendant that deportation, exclusion or denial of citizenship was certain to happen as a result of the conviction. Both the trial court and the plea form used the mandatory "will result" instead of the discretionary "may result." Defendant was advised that adverse consequences were a certainty. Section 1016.5 requires only that the trial court must advise defendants that deportation, exclusion and denial of naturalization may occur. The trial court complied with the requirements of section 1016.5.

Although *Padilla*'s holding does not apply here, defendant nonetheless advances an argument based on the *Padilla* opinion's review of the development of federal immigration law. He contends that he should have received an expanded advisement of immigration consequences because federal courts no longer have the authority to issue a judicial recommendation against deportation, or JRAD. (See *Padilla, supra*, 559 U.S. at p. 362 [JRAD process gave to a sentencing judge the authority to determine whether a

particular conviction should be disregarded as a basis for deportation, and was available for narcotics convictions]; *People v. Paredes* (2008) 160 Cal.App.4th 496, 501, fn. 3 [discussing 8 U.S.C. former § 1251(b)].) Although *Padilla* cites Congress's elimination of the JRAD procedure in 1990 and other changes to immigration law as a basis to conclude that deportation is an integral part of the penalty that may be imposed on non-citizen defendants (*Padilla, supra,* 559 U.S. at p. 364), there is nothing in *Padilla* that compels a trial court to give the type of expanded immigration consequences advisement (including an advisement on asylum and cancellation of removal) for which defendant advocates.

Defendant therefore has not shown the immigration consequences advisement he received and understood was in any way defective. Nor has he shown prejudice, i.e., that he would have rejected the plea agreement he bargained for if he received the advisements that he asserts should have been given. (*People v. Martinez* (2013) 57 Cal.4th 555, 567.) Defendant's declaration accompanying his section 1016.5 motion stated only that he would not have pled guilty if he had been informed "of the special consequences triggered by [his] plea." But, defendant was precisely told of the "special consequences triggered by [his] plea"—namely, that his plea "will result" in his deportation. Defendant therefore has not established prejudice.[6] (*Ibid.*, [prejudice

[6] There were also no contentions in defendant's declaration or his motion itself that he would be eligible for cancellation of removal or asylum. There is accordingly no basis to believe an advisement as to those matters would have affected his decision to plead guilty.

established if a defendant shows he would have rejected the plea offer in the hope or expectation of a better deal or, failing that, going to trial].)

III

DISPOSITION

The order of the superior court dated November 18, 2015, is affirmed.

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RAMIREZ
P. J.

We concur:

HOLLENHORST
J.

MILLER
J.